No. 10686

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*.

———and———

UNITED STATES OF AMERICA, *Appellant*,

v.

BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
HON. CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

CORNELIUS C. CHAVELLE,
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THE ARGUS PRESS, SEATTLE

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OPINION BELOW

The opinion of the District Court (R. 73-85) is reported in 50 F.Supp. 734-738.

JURISDICTION

Appellee accepts the statement of jurisdiction contained in the brief for appellant.

QUESTIONS PRESENTED

I.

The sole question for determination in the Aberdeen Aerie case is whether the Worthy Physician, Worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees were in the employment of Aberdeen Aerie No. 24 of the Fraternal Order of Eagles under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

II.

The sole question for determination in the Ballard Aerie case is whether the Worthy Physicians, Worthy Treasurer and Worthy Trustees and a Musician were in the employment of Ballard Aerie No. 172 of the Fraternal Order of Eagles under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

STATUTES INVOLVED

The only statutes pertinent to this appeal are set forth in Appendix A, *infra.*

REGULATIONS INVOLVED

The regulations pertinent to this appeal are incorporated in Appendix B, *infra.*

STATEMENT OF THE CASE

In our view, appellant's statement of the case is sufficiently comprehensive and correct. Therefore appellee shall not attempt a re-statement.

SUMMARY OF ARGUMENT

A. The relationship of employer and employee has not been established relative to the Aerie physicians of the respective Aeries, and the evidentiary facts clearly indicate that these physicians were independent contractors.

B. Congress did not intend to include within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935 ritualistic officers of a fraternal organization such as the worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees.

C. The services performed by the Worthy President, Worthy Vice-President, Worthy Treasurer, Worthy Trustees and a Musician are principally ritualistic and do not constitute employment within the meaning of Titles VIII and IX of the Social Security Act.

ARGUMENT

1. The Aerie Physicians are not in Employment Within the Meaning of Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code, and of Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

The appellee contends that the Aerie physician in the *Aberdeen Aerie* case is not an employee under Sections 811 (b) and 1101 (a) of the Social Security Act, and Sections 1426 (b) and (d) of the Internal Revenue Code relative to the tax imposed under Title VIII of the Social Security Act.

A similar contention is urged in the *Ballard Aerie*

case that the Aerie physicians are not employees under Title IX of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code.

The District Court in its opinion (R. 73-85) determined that the Aerie physicians be excluded from the provisions of the Social Security Act for the reasons (1) that they are ritualistic officers; (2) that the character of their services was strictly professional and came within the exemptions enumerated in the Departmental Regulations, and (3) they were independent contractors as the evidence failed to establish an employer and employee relationship.

It is to be particularly noted that the District Court was convincingly impressed with the evidentiary fact that the appellee exercised no control or supervision over the manner and means employed in rendering the services, and that the professional services rendered were completely within the discretion of the Aerie physician (R. 82).

It is axiomatic that the relationship of employer and employee exists only when the person for whom the services are performed has the right to direct and supervise an individual who performed such services, not only as to the result to be accomplished by the work, but also as to the details, means and methods employed to accomplish such result. Unless an individual is subject to the will and control of the employer not only as to what shall be done but how it shall be done, the employer and employee relationship cannot be created.

The appellant urges that appellee's Exhibit No. 6, which has been designated as the Constitution for

Subordinate Aeries of the Fraternal Order of Eagles, contains sufficient elements of control from which to conclude that the Aerie physicians are in employment within the meaning of Titles VIII and IX of the Social Security Act.

This court's attention is particularly directed to the Constitution for Subordinate Aeries (Art. 15, Sections 1 to 18 inclusive, pages 30 to 35 inclusive, Appellee's Exhibit No. 6) for the purpose of determining the correctness of the appellant's contention that there is contained in the Constitution, the elements of control, direction and supervision as to the means and methods utilized by Aerie physicians in accomplishing the desired result.

Appellee on the other hand submits that the provisions of the Constitution for Subordinate Aeries (Appellee's Exhibit No. 6) pertaining to Aerie physicians, relates solely to the result rather than to the method or means to be exercised in accomplishing the result. These provisions do not grant to the appellee the prerogative to supervise or control the details of the services performed by the physicians.

The testimony of Dr. Edward B. Riley (R. 120-127) convincingly establishes the Aerie physicians as independent contractors rather than employees within the meaning of the Act.

The following facts are established by the testimony of Dr. Edward B. Riley, and clearly indicate that the Aerie physicians in all instances do not occupy the relationship of employer and employee: The physician is selected by election (R. 120); he provides for any equipment or medicine which may be

used in treating an individual member (R. 123); the services rendered to the Fraternal Order of Eagles constitutes a small percentage of the physician's general practice and he is not required to give preference to members of the Fraternal Order of Eagles in connection with his general practice (R. 123-124); the Aerie does not direct the physician as to the manner or method utilized in treating the members of the Aerie (R. 124-126).

After scrutinizing the testimony of Dr. Edward B. Riley (R. 120-127) it becomes immediately apparent that the necessary elements of control and supervision, in order to establish the legal concept of an employer and employee relationship, are not vested in the appellee and it must necessarily be concluded that the Aerie physicians in issue are independent contractors.

In S.S.T. 212, 1937-2 Cum. Bull. 3971, the following test is set forth for the purpose of determining whether an individual is an employee or independent contractor:

> "In determining whether an individual is an employee or independent contractor the following, among other things, should be considered: (1) the extent or control which the employer may exercise over the details of the work either under contract or in fact; (2) the skill required in the particular occupation; (3) whether the employer or workman supplies the instrumentalities, tools and the place of work; (4) whether the one employed is engaged in a distinct occupation or business; (5) the length of time for which the person is employed; (6) the method of payment, whether by the time or by the job."

It is significant and pertinent to the immediate issue involved that Treasury Regulation 90, promulgated under Title IX of the Social Security Act and Treasury Regulation 91, promulgated under Title VIII of the Social Security Act, codify the common law rule of master and servant and specifically exclude from the operation of the Social Security Act individuals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers and auctioneers who are customarily engaged in an independently established profession or business. These Treasury Regulations it is submitted are determinative as to the question of whether physicians are employees within the meaning of Titles VIII and IX of the Social Security Act, and have repeatedly been considered by the courts as authoritative whenever this immediate issue has arisen.

In commenting upon Article 3 of Treasury Regulation 91, the court made the following observation in the case of *Radio City Music Hall Corporation v. United States*, 135 F.(2d) 715, 717:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor': it is really no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 523, 10 S. Ct. 175, 33 L. Ed. 440, we assumed its conclusiveness in *Texas Co. v. Higgins*, *supra*, 118 F.(2d) 636, 638, and so have the Tenth Circuit (*Jones v. Goodson*, 121 F.(2d) 176, 179) and the Seventh (*Williams v. United States*, 126 F.(2d) 129, 132), the test lies in

> the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said; though the regulation redundantly elaborated it. In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractor. He decides how the different parts of the work must be timed and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees."

A helpful and excellent expression of the pertinency of Treasury Regulations 90 and 91 is contained in the opinion rendered by the court in the case of *Indian Refining Co. v. Dallman*, 31 F.Supp. 455, 456 (affirmed by the Circuit Court in 119 F.(2d) 417):

> "The Social Security Act in both Titles VIII and IX, defines 'employment' as used in the Act, as 'any service, of whatever nature, performed within the United States by an employee for his employer, except' * * *. See Sec. 811 (b), and 907 (c), 42 U.S.C.A. §1011 (b), 1107 (c)."
>
> "Regulations defining the term 'employment,' known as 90 and 91, were duly prescribed and approved by the Commissioner of Internal Revenue pursuant to the provisions of said two titles and other provisions of the Internal Revenue Laws, on February 17, 1936 (relating to Title IX), and on November 9, 1936 (relating to Title VIII). In both of said regulations it was specifically provided that to constitute an 'employment' under the provisions of said two titles,

> 'the legal relationship of employer and employee must exist.' By said regulations certain rules were stated in accordance with which it could be determined whether such legal relationship exists."

This court in the case of *Matcovich v. Anglim*, 134 F.(2d) 834, 837, recognizes the right of control is an essential element of the relationship of employer and employee:

> "While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of the work by the latter and the right to direct the manner in which the work shall be done. * * *"

Appellee invites the court's attention to several analagous cases concerning the status of individuals customarily engaged in an independently established business or profession. It is submitted that these cases are decisive and clearly support appellee's contention that the Aerie physicians in issue are not in employment within the meaning of Title VIII and Title IX of the Social Security Act.

In the case of *Burnet v. Jones* (C.C.A. 8th, 1931), 50 F.(2d) 14, 15, the question presented concerned whether an attorney who was retained under an

agreement to render legal services was an employee, and the court declared:

> "A lawyer who is retained in the affairs of his client is not properly designated an employee. He is an officer of the court. As counselor and advisor to his clients and as an advocate before the court, whatever action he takes is upon independent judgment illuminated by his learning, his skill, his experience, and his ethics. The relationship of attorney and client is entered into and maintained with regard to these considerations, and is not that of employer and employee."

This court in the case of *Childers v. Commissioner of Internal Revenue* (C.C.A. 9th, 1935) 80 F.(2d) 27, 30, ruled that an attorney engaged by an irrigation district on the basis of an annual retainer, with a provision for additional compensation for the trial of cases and services rendered while away from the district, was not an employee:

> "To render one an employee, the employer's right of control must be complete, and extend to the details of the work."

The case which appellee considers controlling is *Burnet v. McDonough* (C.C.A. 8th) 46 F.(2d) 944, 947, wherein the question arose as to whether an attorney engaged by a bridge district upon a retainer basis was an employee. The respondent testified in part as follows:

> "I maintain my own office and the general practice of law. Whatever stenographic or clerical work became incident to the transaction of the Bridge Commission's business was performed by my employees with the exception of probably once or twice in 1921 or 1922."

The court declared that the relationship of employer and employee did not exist:

> "It is clear to us that, under the decisions of the Supreme Court and of this court, respondent was not an employee as that term is used in the statute, but he was an independent contractor. The board reserved no right to direct him as to how his work should be done. He was engaged in the general practice of law. It placed its legal matters in his hands for him to take care of by his own means and methods, relieving it from responsibility therefor. It exercised no such control over him as characterizes the relation of employer and employee. The board would not assume to know how a lawyer should carry on his work. He was engaged to render legal services just as he would have been engaged by a private individual."

The court in the cases of *Commissioner of Internal Revenue v. Modjeski* (C.C.A.2d, 1935) 75 F.(2d) 468, and *Commissioner of Internal Revenue v. De-Leuw* (C.C.A. 7th) 95 F.(2d) 647, decided that a consulting engineer was an independent contractor.

Similarly the court ruled in *Underwood v. Commissioner of Internal Revenue* (C.C.A. 4th, 1932), 56 F.(2d) 67, that a supervising architect occupied a status of an independent contractor.

Appellee particularly relies upon the case of *Meigs v. United States* (C.C.A. 1st, 1940), 115 F.(2d) 13, 17, as excellent authority in support of its argument that the Aerie physicians in issue were not in employment under the terms and provisions of the Social Security Act. The primary question presented in

Meigs v. United States (C.C.A. 1st, 1940) 115 F.(2d) 13, 17, was whether a gynecologist employed by a state hospital was an employee and the court, in concluding that the relationship of employer and employee did not exist, declared:

> "The plaintiff is not subject to sufficient control to be considered an employe. He is in complete charge of the gynecological service of the hospital, and *no one tells him how to treat the patients under his care.* The hospital is interested only in the satisfactory coverage of the service. The plaintiff gives up only a small portion of his time to the hospital and *is under no obligation to give the hospital patients preference over his private patients.* The Pondville State Hospital is only one of four hospitals to the visiting staffs of which the plaintiff is attached. At each of these hospitals he is subject to the regulations and rules governing visiting doctors and could be required to submit reports and consult with other doctors in charge of the institution. *The income from the hospital is but a small portion of his total annual income, and his private practice is extensive.* The plaintiff is considered to be an outstanding doctor in his field, and the reports to, consultation with, and oversight of the superintendent of the hospital is certainly not the type of control necessary to set up the relation of employer and employee." (Italics ours)

The identical issue before this court for determination arose in the cause entitled: "In the matter of a petition for hearing by Ballard Aerie No. 172, Fraternal Order of Eagles, before the Appeal Tribunal of the Unemployment Compensation and Placement

of the State of Washington, Docket No. P-53, reported on April 18, 1942 (C.C.H. Unemployment Insurance Service, Vol. 6, par. 8111.04, Washington,)" wherein it was decided that an Aerie physician rendering services to a Subordinate Aerie of the Fraternal Order of Eagles was not in employment under the provisions of the Washington Unemployment Compensation Act:

> "The first of these conditions is that the services be performed free from direction or control, both under the contract of service and in fact. In considering the status of the physicians, it is important to bear in mind that any reservation of the right to control on the part of petitioner would tend to defeat the purpose of the contracts, for the physicians were engaged to exercise their own professional skill in treating the members. The contracts, by their very nature, seem to preclude the thought of any direction or control by petitioner. It is true, of course, that the physicians are required to keep regular office hours, to give prompt attention to calls, and to do a number of other things pursuant to their contracts. These requirements, however, are merely some of the conditions which go to make up contracts; in no sense may they be said to establish 'direction or control' over the manner of performance. * * *."

In S.S.T. 152, 1937-1 Cum. Bull. 372, it was held that a roentgenologist who interprets x-rays under a contract for a certain company, and who maintains his own office and performs like services for others and is not subjected to any control or direction as to the manner in which his services are performed,

is not an employee of the company within the meaning of Titles VIII and IX of the Social Security Act.

A somewhat analogous situation to the one presented in the instant case appears in S.S.T. 240, 1937-2 Cum. Bull. 403:

> "A physician serves under verbal contract with a coal company whereby he agrees to render medical services to the employees of that company in cases where the company is in any way responsible for the employees' health. The physician must be available at all times. The physician employs two assistants to serve the employees of the company at the physician's direction. The physician conducts his own private practice in which he is assisted by the two aforementioned individuals, but he must give preference to the employees of the company. There is no agreement with the company as to the length of time which the physician is to serve, or as to the discontinuance of his services. He is not required to care for all the employees of the company. The company has nothing whatever to do with the general practice of the physician, and he is paid by the employees of the company for the treatment they receive where such treatment does not fall within the scope of the contract. The physician is paid a regular monthly salary by the company for his services under the contract.
>
> "The regular monthly salary is in effect a fee to retain his services to treat employees of the company in accordance with the verbal contract. The company does not have the right to exercise sufficient control over the manner and means in which the physician performs his duties to establish the relationshp of employer and em-

ployee. The fact that the company furnishes all medicines and dressings and pays the expenses of local hospitalization when necessary is not determinative in this case. It is, accordingly, held that the physician engaged in performing services under the stated circumstances is not an employee of the coal company within the meaning of Titles VIII and IX of the Social Security Act."

Appellant, relying upon Section 1101 (a) (6) of Title XI of the Social Security Act and Sections 1426 (d) and 1607 (i) of the Internal Revenue Code, advances a two-fold contention, namely: (1) that the Aerie physicians by virtue of being officers are employees *per se* and (2) in addition to being officers the Aerie physicians occupy an employer and employee relationship to appellee and that therefore Aerie physicians must be deemed to be included as employees under the provisions of the Social Security Act.

In answer to appellant's contention, appellee adopts the position that a corporate officer is not an employee *per se* but can be an employee if the common law test of employer-employee relationship is met. It is submitted that the better reasoned authority insists upon the establishment of employer-employee relationship as a condition precedent to a corporate officer being considered an employee under the provisions of the Social Security Act.

Appellant cites *Nicholas v. Richlow Mfg. Co.* (C.C.A. 10th) 126 F.(2d) 16, as authority in support of its contention that a corporate officer under Section 1101 (a) (6) Title XI of the Social Security

Act is an employee *per se*. Appellant desires to direct the court's attention to the fact that this cited authority stands alone and has on numerous occasions been rejected.

It is particularly significant that the Government in the case of *Deecy Products Co. v. Welch* (C.C.A. 1st) 124 F.(2d) 592, 594, urged that an individual by virtue of being a corporate officer is an employee *per se*, and that there is no alternative construction that may be placed upon Section 1101 (a) (6) of Title XI of the Social Security Act. In refusing to accept the Government's construction of Section 1101 (a) (6) of Title XI of the Social Security Act, the court declared:

> "We cannot accept the government's construction. We believe with the taxpayer that Section 1101 (a) (6) means that an officer *can* be an employee. In other words, if he meets the test determinative of the ordinary employment relationship, he is an employee and the fact that he is also an officer of the corporation does not destroy his status as an employee under the Act."

The court continued:

> "There is a definite reason why Congress should have enacted Section 1101 (a) (6) even though it is taken to mean that a corporate officer *can* be an employee. In enacting this section it is far more likely that Congress was directing its attention to the very real dispute whether a corporate officer was the type of person intended to be protected by remedial state acts, rather than any dispute about corporate officers meeting the ordinary employment relationship tests. The fact is that there was a great dispute in the state

courts on the question whether a corporate officer was the type of person intended to be covered by the statutes, and there was no such dispute on the question whether corporate officers met the ordinary employment relationship tests. In the absence of Section 1101 (a) (6) it could have been argued that granting the ordinary employment relationship existed with respect to corporate officers, still these superior employees were not intended to be covered by the Act. For that reason Congress might well have felt the necessity of insertng such a section as Section 1101 (a) (6) in the Act so it would be clear that the Act covered superior employees, as well as inferior employees." (Italics ours)

The cases of *United States v. Griswold* (C.C.A. 1st, 1941) 124 F.(2d) 599, and *Indepedent Petroleum Corp. v. Fly* (C.C.A. 5th) 141 F.(2d) 189, are in accord with the construction placed upon Section 1101 (a) (6) of Title XI of the Social Security Act by the court in *Deecy Products Co. v. Welch* (C.C.A. 1st) 124 F.(2d) 592, to the effect that a corporate officer *can* be an employee under Section 1101 (a) (6) of Title XI of the Social Security Act if the relationship of employer-employee exists (Italics ours).

It is submitted that the Aerie physicians in question are not in the true sense of the word corporate officers, and it is apparent from an analysis of the testimony and the Constitution for Subordinate Aeries (Appellee's Exhibit 6) that the necesary elements of control and supervision as to the manner and method to be employed in performance of the services rendered are not present. Therefore it is

futile to contend that there exists in the instant case the legal concept of an employer-employee relationship.

2. Ritualistic Officers of a Fraternal Organization were not intended to be included as employees within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935.

Appellee urges that ritualistic officers such as the Worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees of the respective Aeries of the Fraternal Order of Eagles were not intended by Congress to be included within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935.

The district court adopted the interpretation that to include such officers within the provisions of the Social Security Act would require an absurd and strained construction of the Act and Regulation (R. 79-81).

A material fact to be considered in construing the Act is that the ritualistic officers in question received a most nominal compensation—for instance: the Worthy President $1.00 a quarter (R. 145, 156, 157); the Worthy Treasurer $1.00 per month (R. 213) and the Trustees $1.00 per quarter (R. 146). The district court classified this compensation as mere honorariums (R. 81).

Another significant fact is that each of the officers involved was regularly employed and by virtue of such employment was adequately protected so as to insure them the benefits emanating from the Social Security Act (R. 215).

There can be no question that when Titles VIII and IX of the Social Security Act were enacted, Congress intended through this medium to accord to the citizenry of the United States a panacea from the unfortunate consequences of unemployment. It is apparent that the desire behind this particular Act was to protect the men and women of our country from the hardships of the poor house, as well as from the haunting insecurity that awaits one when the voyage of life is rapidly terminating.

Can it be reasonably and logically concluded that the intention of Congress when they enacted the Social Security Act was two-fold, namely: (1) to include within its provisions an individual regularly engaged in his customary occupation or business and, (2) to include within its provisions this *same* individual who once a week participated in the work of a fraternal organization as a ritualistic officer and receiving compensation as nominal as 33 1/3c per month? Congress had no such intention and such a interpretation is an absurdity.

Congress, in a sincere desire to express its true intention and to clarify and correct an unfortunate situation, in 1939, amended Title VIII and Title IX of the Social Security Act, providing that any organization or individual who was exempt from income tax under Section 101 of the Internal Revenue Code would not be required to pay a tax upon ritualistic officers or upon any individual who earned less than $45.00 during a calendar quarter. This action on the part of Congress is sufficiently convincing to allow this court to conclude that Congress never in-

tended ritualistic officers of a fraternal organization to be included as employees under the terms and provisions of the Social Security Act.

It has been stated repeatedly that in determining the real purpose of a particular act or statute it is customary for the courts to go beyond the words contained in the statute or act. A demonstration of this custom by the courts relative to construing the purpose of a particular statute is found in the case of *United States v. American Trucking Association*, 310 U.S. 534, 543:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose rather than the literal words."

The court condemns a literal construction of statutes which result in absurdities in the case of *Sorrells v. United States*, 287 U.S. 435, 450:

> "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. Judicial nullification of statutes, admittedly valid and

applicable has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction confessedly contrary to public policy and then to decline to enforce it."

Appellee submits that the district court reasonably and logically construed the purpose of the Social Security Act when it declared that ritualistic officers of a fraternal organization, exempt from income tax under Section 101 of the Internal Revenue Code, were not intended by Congress to be included within its terms and provisions (R. 79-81).

3. Services performed by the Worthy President, Worthy Vice-President, Worthy Treasurer, Worthy Trustees and the Musician are principally ritualistic and do not constitute Employment for the purposes of Titles VIII and IX of the Social Security Act.

Appellant argues that the services performed by the officers of the appellee were not exclusively ritualistic, and therefore constitute employment for the purpose of the Social Security Act.

Appellant has in its brief attempted to enumerate the administrative duties of the various ritualistic officers in issue, but has neglected to incorporate in its argument the ritualistic services required of these officers in the Constitution for Subordinate Aeries (Appellee's Exhibit 6).

The court's attention is directed to the Constitution

for Subordinate Aeries (Appellee's Exhibit 6) which will establish that the ritualistic services performed by the officers in issue were not incidental to their administrative duties.

For the purpose of illustration, appellee desires to set forth the ritualistic requirements of the Worthy President provided for in the Constitution for Subordinate Aeries (Appellee's Exhibit 6): To preside at all meetings; to appoint all officers pro tem in the place of absentees; to communicate a semi-annual pass word to each member; to preserve order and decorum; to enforce provisions of the ritual; and he shall have no authority to aid or dispense with any part of the ritualistic ceremony (Art. 9, Sec. 1, p. 16); to decide all questions of order (Art. 9, Sec. 2, p. 17); to cast the deciding vote on all questions on which there may be an equal division of the members (Art. 9, Sec. 3, p. 17); to inspect all ballots (Art. 9, Sec. 7, p. 17); to cause to be read all official correspondence and circulars (Art. 9, Sec. 11, p. 18); to have charge and custody of the rituals and other secret work of the Order and to keep them in a secure place in the Aerie (Art. 9, Sec. 12, p. 18); to appoint all committees and be an ex-officio member of all committees (Art. 9, Sec. 14, p. 18); to visit or cause such member to be visited who becomes ill (Art. 9, Sec. 17, p. 18); upon the death of any member to make the necessary preparations for the funeral, and to render proper services (Art. 39, Sec. 1, p. 75); and to appoint pallbearers (Art. 39, Sec. 2, p. 76); to impose fines on members of the Aerie who are guilty of disorderly behavior at any meeting

(Art. 49, Sec. 6, p. 94); to appoint three or more members of the Aerie as members of the committee on investigation (Art. 26, Sec. 1, p. 44); to appoint an old-age pension committee of not less than three members of the Aerie (Art. 25, Sec. 1, p. 43); to fine any member of the visiting committee in a sum not exceeding $1.00 for their failure to make visitation to the sick (Art. 21, Sec. 5, p. 40); to memorize the Order's ritual within sixty days after his installation (Art. 1, Sec. 6, p. 4).

Appellee submits that all ritualistic officers in issue perform services or duties that are principally ritualistic, and that appellant's argument to the effect that the ritualistic duties of these officers are incidental to the administrative services is without merit. From a close scrutiny and analysis of the testimony introduced in this cause, and of the Constitution for Subordinate Aeries (Appellee's Exhibit 6) it immediately becomes apparent that the ritualistic services performed by the officers of the appellee are of primary importance, and are the exclusive medium and method of furthering and executing the humanitarian, beneficial, social and fraternal objectives of the Fraternal Order of Eagles.

It has been decided that these same ritualistic officers of Ballard Aerie No. 172 of the Fraternal Order of Eagles were not in employment within the meaning of the Washington Unemployment Compensation Act (Rem. Rev. Stat. of Washington, Section 9998-102-119q). (April 18, 1942, C.C.H. Unemployment Service, Vol 6, par. 8111-04, Washington):

"Petitioner's President receives $4.00 a year

> salary. It is his duty under petitioner's Constitution to preside at all meetings, to appoint all officers pro tem in place of absentees, to communicate the pass word, to preserve order, to enforce the ritual and the Constitution of petitioner, to cast the deciding vote in cases of a tie, to sign all warrants, checks, reports and other documents, to appoint committees, and to conduct elections. The petitioner also employs a Vice-President who also receives $4.00 a year and whose duties are mainly to assist the President. Held: The evidence and petitioner's Constitution very definitely establish that the services of the petitioner's President and Vice-President are *principally ritualistic* in nature and that their administrative activities are largely incidental thereto. Therefore, their services do not constitute employment." (Italics ours)

Concerning the status of the Musician in the Ballard Aerie case, the District Court concluded that he was not an employee within the meaning of the Social Security Act. (R. 81-82).

The Musician is appointed by the Worthy President and is an officer of the Aerie. His duties consist of playing the piano for the opening and closing of ritualistic ceremonies and during the initiatory services at the weekly meetings of the Aerie, for which he receives as compensation $2.00 to $2.50 per meeting (R. 200-202). It is the position of the appellee that the Aerie Musician was never intended to be included within the terms and provisions of the Social Security Act and that the services rendered by him are principally ritualistic.

Appellee contends that the ritualistic officers are

exempt from the operation of the Social Security Act for the reasons that Congress never intended to include such individuals within the terms and provisions of the Act, and that the services rendered by these officers are principally ritualistic.

CONCLUSION

I.

That the judgment of the District Court should be sustained concerning the question of the status of the Aerie physicians because it is obvious from the evidentiary facts that the Aerie physicians were not employees within the meaning of Title VIII and Title IX of the Social Security Act, but were quite clearly independent contractors.

II.

The ritualistic officers of a fraternal organization were never intended by Congress to be included within the terms and provisions of Titles VIII and IX of the Social Security Act.

III.

That the services rendered by the ritualistic officers and a musician to the respective Aeries were principally ritualistic and therefore could not constitute employment within the meaning of Titles VIII and IX of the Social Security Act.

Respectfully submitted,

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APPENDIX A

Social Security Act, c. 531, 49 Stat. 636

TITLE VIII.—EMPLOYMENT TAXES

SECTION 801. * * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 811) received by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (26 U.S.C.A. §1400).

SEC. 804. * * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (26 U.S.C.A. 1410).

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, * * *.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer.

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE

SECTION 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year: (26 U.S.C.A. 1600).

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, * * *.

as to *what* shall be done but *how* it shall be done. In

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer. (26 U.S.C.A. 1607).

TITLE XI — GENERAL PROVISIONS

SECTION 1101. (a) When used in this Act—

(6) The term "employee" includes an officer of a corporation.

SEC. 1426 (as amended by the Social Security Act Amendments of 1939, effective January 1, 1940, Sec. 606). DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, * * *.

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *.

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, * * *.

(26 U.S.C.A. 1426).

SEC. 1607 (as amended by the Social Security Act Amendments of 1939, Sec. 614). DEFINITIONS.

When used in this subchapter—

(b) The term "wages" means all remuneration for employment, * * *.

(c) The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * * except—

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such soicety, order, or association, * * *.

APPENDIX B

REGULATIONS

Treasury Regulations 91, concerning Title VIII of the Social Security Act:

ART. 3. *Who are employees.*—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in Section 811 (b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual perform-

ing services as an independent contractor is not as to such services a employee.

Generally physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Treasury Regulations 90, concerning Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in Section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

* * * * * * * * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic

of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.